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In the Supreme Court of the United States

No. 333.

OCTOBER TERM, 1970.

ROBERT BENNETT, *et al.*,

Petitioners,

vs.

CITY OF CLEVELAND, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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I.

OPINIONS.

This action originated in the United States District Court for the Northern District of Ohio, Eastern Division and the opinion rendered therein on June 24, 1969 is set forth beginning at page 9 of the Petition for a Writ of Certiorari.

The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court may be found at page 20 of said Petition.

II.

PRELIMINARY STATEMENT.

For the purpose of this brief the plaintiffs below, Robert Bennett and Evelyn Schrenk, will be referred to as petitioners and the defendants below, the City of Cleveland, Ohio, its thirty-three councilmen and the four members of the Board of Elections of Cuyahoga County, Ohio, will be referred to jointly as respondents. All emphasis is that of the respondents unless otherwise indicated.

The respondents concur in the jurisdictional statement found on page 2 of the Petition for a Writ of Certiorari and in the applicable constitutional and charter provisions set forth on pages 3 and 4 of said Petition.

III.

QUESTIONS PRESENTED.

In respondents' view, the issues raised by the petitioners may be stated in the following terms:

1. Does the nominating process for the office of councilman mandated by Section 10 of the Charter of the City of Cleveland authorize a form of invidious discrimination which denies petitioners the equal protection of laws guaranteed by the Fourteenth Amendment to the United States Constitution?

Respondents' answer is no.

2. Were the District Court and the Circuit Court of Appeals correct in applying the law of the forum with respect to the application and construction of the Constitution and laws of the State of Ohio and the charter of the City of Cleveland?

Respondents' answer is yes.

IV.

STATEMENT OF THE CASE.

The essence of the complaint filed in the District Court was a challenge to the method authorized by the charter of the City of Cleveland for the nomination and election of the thirty-three councilmen of the City, all of whom are elected under a ward system. The petitioners are registered voters who sought a declaration that said method as controlled by Sections 10 and 13 of the charter was unconstitutional under both the United States and Ohio Constitutions and in conflict with the general election laws of the State.

All councilmanic elections in the City of Cleveland are non-partisan in nature so that one voting at a primary election does not have to declare his party affiliation in order to receive a ballot and cast his vote for a candidate for the office of councilman.

Section 10 of the Charter of the City of Cleveland provides for the selection of candidates for member of council from each ward of the City. If there are only two candidates for council in any given ward, no primary election is held and the two qualified persons who filed proper petitions are the candidates at the regular municipal election. If, however, more than two persons file proper petitions for the office of councilman in any given ward, then a primary election shall be held. If any candidate at such primary election shall receive a majority of all the votes cast for the office of councilman, he shall be the candidate for such office whose name shall be printed on the official ballot at the general election and he shall run only against write-in opposition. Should no candidate receive a majority of the votes cast at the primary election, the two candidates receiving the highest num-

ber of votes at said election shall be the two candidates for said office at the general election.

Section 13 of the Charter makes provisions for a write-in vote at the general election regardless of whether the names of one or two candidates are printed on the ballot at the general election. As indicated in our preliminary statement, copies of Sections 10 and 13 of the Charter can be found at pages 3 and 4 of the Petition for a Writ of Certiorari.

V.

REASONS WHY THE WRIT SHOULD BE DENIED.

As a preface to the argument which follows, we direct the court to the comprehensive opinion of the District Court which appears at pages 9 to 19, inclusive, of the Petition for a Writ of Certiorari. Respondents concur in the reasoning found therein and urge its conclusions as being in complete accord with the pronouncements of this Court on the subject of one man-one vote.

It should also be noted that petitioners made an extensive argument in the Circuit Court urging that this Court's decision in *Della Hadley, et al., Appellants v. The Junior College District of Metropolitan Kansas City, Missouri, et al.*, 397 U.S. 50 (1970), could somehow be interpreted as casting doubt on the constitutionality of the subject charter provisions, but the contention was unanimously rejected by the Circuit Court.

(a) Invidious Discrimination.

In attempting to apply the Fourteenth Amendment and the "one man-one vote" principle to this case, it is necessary to inquire into the facts alleged in the complaint to ascertain the existence of an invidious classification

which, if supported by the evidence, would deprive the petitioners of equal protection of the laws.

Therefore, for purposes of argument, we accept as true all the fact allegations in the complaint with the intent of weighing them against the invidious discrimination standard set forth in the line of decisions of this Court illustrated by *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1960) and *McLoughlin v. Florida*, 379 U.S. 184, 191-193 (1964).

Applying this test to the form of election proceedings prescribed by Section 10 of the Cleveland charter, both the District Court and the Circuit Court were satisfied that said section does not contain the invidious element that causes a particular group or classification to be subject to some type of oppressive treatment which either deprives them of the right to vote or denies a fair weight to that vote when it is cast. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964).

In support of the determination below, respondents call attention to the principle that when a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and imminent. *American Federation of Labor v. Watson*, 327 U.S. 582, 593 (1946). Applying that rule to the present issue, one finds that the import of the complaint when denuded of its legal conclusions is not that the people of Cleveland are in *any* way deprived of their franchise, but only that they do not always choose to exercise it to the same extent at primary and general elections. In fact, based on the allegations in the complaint, it can be demonstrated that approximately forty percent of the eligible voters fail to exercise their franchise at *any* municipal election regardless of when it is held. We can find no precedent for invoking the irrepa-

rable injury doctrine where the sole claim of injury is predicated on willful neglect.

This argument is graphically illustrated by the fact that the primary election for office of councilman in the City of Cleveland is non-partisan in nature so there can be no claim that the independent voter is disenfranchised by the election procedures found in Section 10 of the City's charter. Quite to the contrary, the Cleveland system of conducting a primary election is actually predicated on a sounder premise of equality than a partisan primary election and a run-off general election. Under the Cleveland system, which is not unique but is used in other localities throughout the nation, the independent voter or the person who for business or personal reasons does not wish to openly declare his political affiliation, can have the full impact of his vote felt in the initial choice of a local elective representative. He is not relegated to selecting from what he may feel is the lesser of two evils resulting from the nomination of partisan candidates at a primary election in which he had no participation.

Conversely, if we were literally to apply the contention of petitioners to all election laws, we would be confronted with an intolerable situation. For example, under petitioner's theory, one would have to assume that all special elections for candidates, levies or bond issues for schools or other local government units would be invalid under the Fourteenth Amendment, since it is a matter of general knowledge that the participation by the electorate in this type of election is usually in much smaller proportion than voter turn-out at either a primary or general election.

In fact, carried to its logical conclusion, petitioner's contentions would have the effect of eliminating Cleveland's primary election altogether since the larger number

of people voting at a general election are not given the same broad choice of candidates accorded to the persons voting at the non-partisan primary election.

In their argument in support of the request for a writ of certiorari, petitioners take the position that the rulings below are not in accord with the pronouncements of this Court in *Hadley v. The Junior College District, supra* and *Wesberry v. Sanders,* 376 U.S. 1 (1964).

However, a reading of the *Hadley* case readily evidences the fact that this Court was considering a statute which authorized an election procedure containing a built-in discrimination against voters in the more populous school districts that formed the junior college district in question. Likewise in *Wesberry,* the court was confronted with an admitted situation wherein the apportionment of the congressional districts in the State of Georgia was found to be grossly discriminatory to voters in the larger districts. The instant case does not involve a question of apportionment nor any application of the "as nearly as practicable" standard annunciated in *Wesberry v. Sanders, supra.* In the present case, the Court is confronted with facts which demonstrate a form of voter apathy, not inequality of the vote.

In *Hadley v. The Junior College District, supra,* this Court reiterated its approval of the proposition that the Fourteenth Amendment does not inhibit state and local governments from finding ways to insure legitimate political goals and cited as examples *Dusch v. Davis,* 387 U.S. 112 (1967) and *Sailors v. Board of Education,* 387 U.S. 105 (1967). In addition, we do not find anything in the pronouncements by this Court in *Hadley* which modify the conclusion of Mr. Justice White in *Avery v. Midland County Texas,* 390 U.S. 474, 485, wherein he states with respect to the problems of local governments:

"This court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. *The Constitution does not require that a uniform strait-jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.*"

Therefore, respondents say that the election cases decided by this Court fully support the right of the City of Cleveland in the exercise of its legitimate state interest to conduct its local elective process in accordance with the provisions of Sections 10 and 13 of its charter.

(b) Construction of Local Law.

Petitioners in their statement of the issues raised a claim of error by the lower courts with respect to said courts' construction of the Constitution and laws of the State of Ohio and the charter of the City of Cleveland. However, petitioners do not argue this question in discussing their reasons for requesting a Writ of Certiorari. Therefore, respondents comment only to the extent of observing that the construction of state law by a state court has been accepted as binding in the federal forum. Thus, the courts below were correct as a matter of law in applying the interpretation of the Ohio courts with respect to the construction of the Constitution and laws of the State of Ohio and the charter of the City of Cleveland. See *State ex rel. Pecyk v. Green*, 102 Ohio App. 297 (1953) and *State ex rel. Gamble v. Green*, 164 O. St. 231 (1955).

VI.

CONCLUSION.

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied for the reason that no legitimate issue involving the application of the equal protection clause of the Fourteenth Amendment is presented by the facts in this case.

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